



REPUBLIC OF KENYA



**KENYA LAW**  
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**Surya Holdings Limited & 2 others v CFC Stanbic Limited & another  
(Petition 8 of 2019) [2020] KESC 2 (KLR) (Civ) (4 December 2020) (Ruling)**

*Surya Holdings Limited & 2 others v CFC Stanbic Limited & another [2020] eKLR*

Neutral citation: [2020] KESC 2 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL**

**PETITION 8 OF 2019**

**PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

**DECEMBER 4, 2020**

**BETWEEN**

**SURYA HOLDINGS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**RHEA HOLDINGS LIMITED ..... 2<sup>ND</sup> APPELLANT**

**KARUTURI LIMITED ..... 3<sup>RD</sup> APPELLANT**

**AND**

**CFC STANBIC LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MUNIU THOITHI AND KURIA MUCHERU (JOINT RECEIVERS AND  
MANAGERS OF KARUTURI LIMITED) ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for extension of time to file a Supplementary Record of Appeal out of time against the decision of Court of Appeal at Nairobi (Ouko, Musinga & Gatembu JJA) dated and delivered on 25th January 2019 in Civil Appeal No. 114 of 2018, on the 25th of January, 2019)*

**RULING**

**Introduction**

1. The appellants by way of Notice of Motion application dated 18th September, 2020 and filed on 21st September 2020 and brought under Rule 40(4) of the *Supreme Court Rules* 2010 (*sic*) seek the following orders:
  - a) That the Honorable Court be pleased to grant leave to the Appellants to file a Supplementary Record of Appeal containing;



- i) The Supplementary Record of Appeal filed by the Respondent at the Court of Appeal and which comprises the Debenture Agreement dated 8th December 2010;
  - ii) The 1st Respondent's Written Submissions dated 5th July 2018 filed at the Court of Appeal; and
  - iii) The 2nd Respondent's Written Submissions dated 23rd July 2018 filed at the Court of Appeal.
- b) That the Supplementary Record of Appeal be filed within seven (7) days or such period as the Court will determine.
  - c) That costs of this application be in the Appeal.
2. The application is based on the grounds that the Respondents' written submissions filed at the Court of Appeal and the Supplementary Record of Appeal filed by the 1st Respondent in the Court of Appeal were inadvertently omitted while compiling the Record of Appeal and that it is necessary that the documents are placed before this Court for completeness of record.
  3. The application is supported by the annexed affidavit of Fredrick Ngatia, an Advocate who has the conduct of this matter on behalf of the appellants. The appellants also filed submissions on 21st September 2020 reiterating the grounds in support of the application and adding that the regrettable omission, which was not discovered earlier, was occasioned by the great urgency with which the record of appeal was compiled in order to preserve the substratum of the appeal. They submit that none of these documents raise any new matters as to cause prejudice. They further submit that both parties will be at liberty to refer to them during the hearing of the appeal, the parties having already advanced rival arguments set out in the rival arguments set out in the respective written submissions already on record. The appellants urge the Court to make an identical finding as was in *Alfred Asidaga Mulima & 2 others (suing as representatives of ex-East African Airways Staff Welfare Association) v Attorney General & 8 Others* [2019] eKLR and exercise discretion in their favour.
  4. The Respondents vide their written submissions filed on 2nd October 2020 do not oppose the application in view of the extreme urgency in the matter and seek that the main petition be fixed for hearing.

#### **Issue for determination**

5. The emerging issue for determination is whether to grant leave to the appellant to file the supplementary record of appeal out of time.

#### **Analysis**

6. In considering whether to exercise discretion and grant leave to file documents out of time, we have time and again restated that the onus is on the applicant to explain the delay and that no prejudice will be caused to the opposing party. Rule 40(4) of the *Supreme Court Rules* 2020 obligates an applicant to seek leave to file a Supplementary record of appeal to include a document omitted from the record of appeal unless such a supplementary record of appeal is filed within 15 days of lodging the record of appeal.
7. We note that the parties herein agree as to the need for the supplementary record of appeal to be filed, the documents sought to be introduced being central to the substratum of the appeal. It is apparent that the Debenture dated 8th December 2010 was also presented to the Court of Appeal by way of



supplementary record of appeal and that the submissions filed at the Court of Appeal are relevant to the appeal herein.

8. The parties having already filed their substantive appeal on 14th February 2019 and the Court having issued conservatory orders in this matter on 22nd March 2019, we are persuaded to exercise our discretion in favour of the appellants and allow the application in order to progress the appeal for hearing at the earliest.

**Determination**

9 Accordingly, the Notice of Motion application dated 18th September 2020 is allowed in the following terms:

- a) Leave be and is hereby granted to the appellants to file a Supplementary Record of Appeal containing:
  - i) The Supplementary Record of Appeal filed by the Respondent at the Court of Appeal and which comprises the Debenture Agreement dated 8th December 2010;
  - ii) The 1st Respondent’s Written Submissions dated 5th July 2018 filed at the Court of Appeal; and
  - iii) The 2nd Respondent’s Written Submissions dated 23rd July 2018 filed at the Court of Appeal.
- b) The Supplementary Record of Appeal be filled within seven (7) days from the date of this ruling.
- c) Costs of this application to abide the outcome of the appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF DECEMBER 2020**

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**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

.....

**M.K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNG’U**  
**JUSTICE OF THE SUPREMECOURT**

.....

**I. LENAOLA**



**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

**REGISTRAR**

**SUPREME COURT OF KENYA**

